

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD LAMAR HOWARD,

Defendant-Appellant.

UNPUBLISHED

April 21, 2005

No. 250579

Wayne Circuit Court

LC No. 03-004769-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his bench convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b(1). Defendant was sentenced to concurrent terms of five to ten years' imprisonment for the assault conviction, and two to five years' imprisonment for the felon in possession conviction. These sentences are to be served consecutively to a sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the trial court erred in failing to apply the defense of duress to the charge of felon in possession. Defendant did not argue duress in the lower court proceedings; thus, the issue is unpreserved. We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999). The trial court did not commit plain error in failing to apply the defense of duress to defendant's charge of felon in possession because defendant did not raise the defense.

Defendant did argue at trial a valid claim of self-defense to the assault charge. He now argues that the court erred when it rejected this defense. We review a trial court's findings of fact in a bench trial for clear error, giving consideration "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

The trial court rejected the claim of self-defense because it found that defendant was not in imminent danger of death or great bodily harm. We agree. To establish a valid claim of self-defense, the actor must "honestly and reasonably believe that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The trial court found that the shots fired outside of defendant's home did not place defendant in any imminent danger. Moreover, the shots fired

outside the home were unrelated to defendant's shooting of the victim in the basement, as the trial court also found that defendant did not fire at the victim in response to a gunshot fired in the basement. Therefore, the trial court found that the victim did not place defendant in any imminent danger, and that defendant did not act in self-defense. The trial court's findings were not clearly erroneous and were supported by the evidence adduced at trial and the trial court's assessment of witness credibility. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); MCR 2.613(C).

Defendant next argues that there was insufficient evidence to convict him of assault with intent to do great bodily harm. We review a claim of insufficient evidence de novo and in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

There was sufficient evidence to convict defendant of the assault offense. The elements of assault with intent to do great bodily harm are: (1) an assault, coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). Defendant admits to shooting the victim, but claims that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he possessed the specific intent to do great bodily harm. Our review of the record reveals that the trial court correctly inferred specific intent to do great bodily harm from the fact that defendant fired a shotgun into the basement and at the victim after giving the victim only five seconds to leave the house.

Defendant also argues that he received ineffective assistance of counsel from trial counsel. Because defendant failed to raise this issue in conjunction with an evidentiary hearing or in a motion for new trial, we will consider this issue only to the extent that the claimed counsel errors are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). "[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "To find prejudice, a court must conclude that there is 'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt,'" *id.* at 312, quoting *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant claims that he was denied effective assistance of counsel because his attorney was unprepared for trial; however, there is no evidence on the record supporting this claim. Likewise, defendant's claim that he was denied effective assistance of counsel because his attorney did not raise the defense of duress fails because defendant was not prejudiced by defense counsel's failure to raise this defense. The trial court's explanation as to why it rejected defendant's argument that he picked up the gun in self-defense demonstrates that the trial court would also have rejected that defendant picked up the gun under duress. The elements of duress and self-defense are similar. Both duress and self-defense require that the actor honestly and reasonably believe that he is in imminent danger of death or great bodily harm. A threat of

future injury is not enough. *Riddle, supra* at 119; *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).

As previously discussed, the trial court found that the shots fired outside did not place defendant in imminent danger. The trial court further opined that grabbing the gun was an act of aggression, not self-defense, because defendant testified that he grabbed the gun to confront the shooter outside. Defendant was not prejudiced by his attorney's failure to raise the defense of duress. It is clear from the trial court's oral ruling that it would have rejected the defense if it had been raised. It is also clear that such a rejection would have been proper on the evidence and did not support a finding that defendant could reasonably believe that he was in imminent danger of harm when he retrieved the gun.

Defendant further argues that the trial court abused its discretion in denying defendant's requests for change of counsel and self-representation. However, a review of the record reveals that defendant made no such requests. Defendant's claim, therefore, fails for lack of record support.

Defendant finally argues that he was coerced by his attorney and the trial court to waive his constitutional right to a trial by jury. Because defendant did not move for a new trial, this issue is unpreserved. We review unpreserved claims of constitutional error for plain error affecting substantial rights. *Carines, supra* at 764. The trial court did not commit plain error in accepting defendant's waiver of his right to a jury trial. The record contains no evidence that defendant was coerced by either the trial court or his attorney to waive his right to a jury trial. Instead, as the trial court found, the record demonstrates that defendant waived his right knowingly and voluntarily. MCR 6.402(B).

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra